STATE OF MICHIGAN

IN THE SUPREME COURT

RANDY C. BURRIS,

Plaintiff/Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court No. 132949

Court of Appeals No. 261505

Wayne County Circuit Court
Case No. 02-208320-NF

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132949

AMICUS CURIAE BRIEF OF THE

COALITION PROTECTING AUTOMOBILE NO-FAULT

("CPAN")

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STATEMENT OF INTEREST AS AMICUS CURIAE

The Coalition Protecting Auto No-Fault ("CPAN") is an organization aimed at sustaining vital benefits for injured victims under the Michigan Automobile No-Fault Insurance Act (the "No-Fault Act"), MCL §500.3101, et seq. Specifically, CPAN is geared towards maintaining the protection of the current no-fault system which affords payment of unlimited lifetime medical and rehabilitative expenses for all persons who suffer injuries in motor vehicle accidents. Various medical provider groups and consumer organizations, including the following, have banded together to promote the mission of CPAN:

Medical Provider Groups	**Consumer Organizations**
Michigan Academy of Physicians Assistants	Brain Injury Association of Michigan
Michigan Assisted Living Association	Disability Advocates of Kent County
Michigan Association of Centers for Independent Living	Michigan Paralyzed Veterans of America
Michigan Brain Injury Providers Council	Michigan Partners for Patient Advocacy
Michigan Chiropractic Society	Michigan Protection and Advocacy Services
Michigan College of Emergency Physicians	Michigan Rehabilitation Association
Michigan Dental Association	Michigan Citizens Action
Michigan Health & Hospital Association	Michigan Consumer Federation
Michigan Home Health Care Association	Michigan State AFL-CIO
Michigan Orthopedic Society	Michigan Association for Justice
Michigan Orthotics and Prosthetics Association	Michigan Tribal Advocates
Michigan Osteopathic Association	Michigan UAW
Michigan State Medical Society	American Association of Retired Persons
Michigan Nurses Association	

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The interests of CPAN are implicated in this case, because the issues presented may affect whether family members continue to be compensated when care is provided for an injured loved one in the home after a motor vehicle accident. If accepted as correct, the defense's interpretation of the No-Fault Act will force family members to step away from providing care to injured loved ones in the home because it imposes hyper-technical requirements on reimbursement for in home family member provided care under the no-fault law. The end result will be that the injured person must either turn to commercial agencies for care in the home (simply to avoid being institutionalized) or the family members must join (or become) a commercial agency in order to be compensated. Such a drastic change in how the No-Fault Act is interpreted would only drive up costs and hurt the current no-fault system. The concern for CPAN and its members is manifest under the circumstances. Accordingly, CPAN opposes the defense's extra-statutory interpretation of the meaning of the term "incurred", as it is used in Section 3107(1)(a) of the No-Fault Act.

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STATEMENT AS TO JURISDICTION

CPAN adopts Plaintiff-Appellee's Counter Statement as to Appellate Jurisdiction.

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STATEMENT OF FACTS

CPAN adopts the facts as set forth by Plaintiff-Appellee in his Briefs on Appeal.

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STATEMENT OF QUESTION PRESENTED

CPAN adopts the Plaintiff-Appellee's Counter Statement of Questions Presented.

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INTRODUCTION

The No-Fault Act makes no distinction between care provided for an injured person by a commercial agency and care provided by immediate family members. Similarly, the No-Fault Act does not distinguish between care when provided in the injured person's home and care when provided in an institutional setting. Section 3107(1) of the No-Fault Act states only that "personal protection insurance benefits are payable for the following":

> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . [MCL §500.3107(1)].

Unlike workers' compensation, where attendant care provided is limited to 56 hours per week, when provided by the injured person's immediate family members, the No-Fault Act contains no such limits on family member provided care. See generally, MCL §438.315(1).

ANALYSIS

In this case, the no-fault insurer seeks to avoid paying for in-home family member provided care by disputing whether the expense of providing such care was "incurred". The No-Fault Act, however, does not define "incurred", nor does it specify who must "incur" the expense for benefits to be paid to the injured person. Section 3107(1)(a) of the No-Fault Act says only "incurred" – not incurred by the injured person. MCL §500.3107(1)(a).

I. Care Provider's Expectations of Payment (or Lack Thereof) Are Not Relevant

If someone needs care in the home because of auto accident related injuries, and the no-fault insurer would be obligated to pay for such care otherwise, e.g., but for the willingness of a family member to provide care without expecting payment, the expense is *incurred* regardless of any expectations as to payment (or lack thereof) which the care provider – in this case, an immediate family member – may have had in providing care to

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the injured person. Effectively, the family member providing care is a surrogate for the person the no-fault insurer would have had to hire from a commercial agency to provide care in the home for the injured person if he or she had no family willing to provide care.

Similarly, the care provider's viewpoint about what is a reasonable charge for providing in-home care for an injured family member does not dictate what must be paid by the no-fault insurer to compensate the provider for caring for the injured person. Instead, the fair market value for the actual services must be considered, not simply one person's subjective expectations about what is a reasonable charge for the care provided. See generally, *Manley v DAIIE,* 127 Mich App 444, 455, 339 NW2d 205 (1983), vacated on other grounds, 425 Mich 140, 338 NW2d 216 (1986) (in home care provided by the parents of the injured person were "implicitly purchased" at a "reasonable market value").

If the family member providing care in the home also happened to be the CEO of a Fortune 500 company, who took leave to care for his injured child, it would not be relevant that he valued his time very highly (and mistakenly expected to be paid that rate because he was losing a lot of money by taking unpaid leave time to care for his child). By the same token, the subjective expectations of a parent that no payment will be forthcoming and care is being provided gratuitously should have no bearing on whether (or what) the no-fault insurer must pay for care provided to the injured person in the home.

Moreover, Section 3142(2) of the No-Fault Act is clear that the no-fault insurer must pay benefits for everything that is not disputed, stating that "if reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer." MCL §500.3142(2). In other words, the mere fact that the no-fault insurer may not agree with how the injured person

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(or the care provider) has assessed the value of the care does not obviate the need for the no-fault insurer to pay what it believes is the reasonable value of the care being provided.

Clearly, the care provider's expectations as to whether or not he or she will be paid at all for services being rendered on behalf of an injured family member are not controlling. Payment expectations (or lack thereof) by someone who cares for an injured family member after a motor vehicle collision are simply irrelevant to whether the expense was incurred. The only truly relevant inquiries to be made are whether: 1) the no-fault insurer would have had to pay for the injured person's care, if rendered by non-family members hired from commercial agencies to care for the injured person; and 2) the amount being charged is reasonable for care being provided by family members, who are merely surrogates for non-family member provided commercial agency care. MCL 500.3107(1)(a).

II. Expenses Are Incurred Whenever Reasonably Necessary Care Is Provided

If the no-fault insurer must pay for the injured person's care, an expense has been "incurred". Incurred means nothing more than "to become liable for", according to *Random House Webster's Collegiate Dictionary* (1995), at p 638. Moreover, the clear unambiguous language used in Section 3107(1)(a) of the No-Fault Act supports such an interpretation. The Legislature said in Section 3107(1)(a) that PIP benefits are payable for the following:

> Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery and rehabilitation. [Emphasis added]. [MCL §500.3107(1)(a)].

The Legislature could just as easily have said the following if it had intended that the charges be incurred by the injured person only:

> Allowable expenses consisting of all reasonable charges incurred *by the injured person* for reasonably necessary products, services, and accommodations for the injured person's care, recovery and rehabilitation. [Emphasis added].

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Under the No-Fault Act, an insurer is liable to pay for care if the injured person is entitled to benefits and if the allowable expense requirements of Section 3107(1)(a) are fulfilled, e.g 1) the service is reasonably necessary for the injured person's care, recovery and rehabilitation 2) from injuries the injured person sustained in the motor vehicle accident and 3) the services are actually provided to the injured person. See MCL §500.3107(1)(a). While the no-fault insurer may argue that one requirement under Section 3107(1)(a) is that a charge be "incurred" – after all, the law states "all reasonable charges incurred"– the use of the word "incurred" in defining "allowable expenses" says nothing more than that someone must pay the charges, which means the injured person or the no-fault insurer. In other words, the charges are "incurred" as to both the injured person and the no-fault insurer (although obviously, the charges need only be paid by one to satisfy the claim).

In sum, Section 3107(1)(a) says "all reasonable charges incurred for products, services, and accommodations for the injured person's care, recovery and rehabilitation". It does not say all reasonable charges incurred by the injured person. Simply put, the No-Fault Act uses the word "incurred" neutrally; it does not say *who* must incur the charges. If the Legislature had intended a requirement that the charge be incurred by the injured person only, it would have been easy for them to say those words, instead of using the actual language in Section 3107(1)(a), which is not specific about who incurs the expense.

Nonetheless, the no-fault insurer in this case concludes based on clearly neutral statutory language in Section 3107(1)(a) that the injured person must be the one who incurs the charges, even though the statute itself never specifies that the charges must be incurred by the injured person. Clearly, the charges must be incurred, but charges can also be incurred by an insurer when it becomes obligated to pay benefits under a contract.

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Thus, even if this Court concludes that expenses were not incurred by the injured person when his family members cared for him, the expense was incurred by the no-fault insurer.

III. Expenses Are Incurred Regardless of Whether Reasonable Proof Is Provided

In this case, the no-fault insurer wants to blur the otherwise clear distinction between whether an expense was incurred and whether the no-fault insurer is liable to pay benefits. The no-fault insurer contends that reasonable proof of loss cannot be provided at trial because if the plaintiff waits for the trial, the expense is not incurred and need not be paid. The no-fault insurer wants to question whether reasonable proof of loss was provided before trial, and if not, claim that no liability exists because the expense was not "incurred". On this point, however, **the no-fault insurer is clearly wrong**. Simply stated, the expense of providing care is *incurred*, regardless of whether reasonable proof of the loss is provided (although clearly, the expense need not be paid, if reasonable proof of loss is not shown). See generally, *Booth v Auto-Owners*, 224 Mich App 724, 730, 569 NW2d 903 (1997).

Stated differently, benefits must be *paid* only when reasonable proof of loss is provided but regardless, the expense is *incurred*. The No-Fault Act does not dictate when such proof must be shown. Thus, nothing must be done before trial to "incur" the expense.

In this instance, the no-fault insurer confuses two distinct concepts in no-fault law – when an expense is incurred and when the no-fault insurer must actually pay the incurred expense. The concept of "incurred" must merge with there being "reasonable proof of loss" before the no-fault insurer must pay benefits or be sanctioned under the penalty provisions of the No-Fault Act, e.g., MCL §500.3142 (interest) and MCL §500.3145 (attorney fees). The no-fault insurer must pay the care provider whenever services have been rendered (so long as the entitlement and allowable expense criteria in No-Fault Act have been satisfied).

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Under the No-Fault Act, expenses are incurred for in-home family member provided care whenever there is 1) accidental bodily injury; 2) arising out of the ownership, operation, maintenance or use of motor vehicle as a motor vehicle; 3) the service is "reasonably necessary" for the injured person's care, recovery and rehabilitation; 4) and the service is for the injured person's care, recovery and rehabilitation due to injuries suffered in the underlying motor vehicle accident. See generally, MCL §500.3105 (entitlement to no-fault benefits) and MCL §500.3107(1)(a) (allowable expense benefits). If reasonable proof of loss is provided, which meets those most basic requirements, the expense of having in-home family member provided care has been incurred and the no-fault insurer must pay for the injured person's care (at least the part that is "reasonable").

IV. Expenses Can Be Incurred By Injured Persons Or No-Fault Insurers (or Both)

Expenses do not always have to be incurred by the injured person. Expenses can be incurred by the injured person or the no-fault insurer responsible for paying the claim. If interpreted in that fashion, "incurred" has a meaning which is consistent with the notion of hospital's having a direct cause of action against an insurance company. See generally, *Lakeland Neurocare Centers v State Farm*, 250 Mich App 35, 645 NW2d 39 (2002); and *Regents of the Univ of Michigan v State Farm*, 250 Mich App 719, 650 NW2d 129 (2002).

Section 3105 of the No-Fault Act is also consistent with this view of "incurred", because it states that "an insurer is liable to pay benefits" if basic entitlement requirements are satisfied. See MCL §500.3105. The mandatory nature of this obligation confirms that an expense is incurred whenever services are rendered to a person entitled to benefits.

Similarly, the introductory phrasing of Section 3107(1) of the No-Fault Act states that personal insurance protection "benefits are payable for" the following" – in other words, the no-fault insurer must pay them – subject, of course, to the requirements of Section

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3107(1)(a) as to reasonableness and necessity (and as clarified by this Court, relationship of the services to the injuries actually sustained in the underlying motor vehicle collision).

CONCLUSION

If the defense is correct that the care provider's expectations are the key to whether benefits must be paid, no-fault insurers will benefit from a "windfall" due solely to people's ignorance in providing care to a family member injured in a serious motor vehicle collision. The real question in such cases, however, should ultimately be whether the expense is something that the no-fault insurer would have been obligated to pay for under its contract and the No-Fault Act's requirements once reasonable necessity was established and upon a showing that the needed services were actually rendered on behalf of the injured person. If the no-fault insurer should pay that expense, the no-fault insurer cannot "get off the hook" simply because the care provider was ignorant and the no-fault insurer said nothing to them. This is especially true with in-home care because in most cases the no-fault insurer actually saves money because paying family is cheaper than paying a commercial agency.

In this case, the defense wants to interpret the no-fault law in a way that does not comport with how it reads (and thus, how the legislature intended it to be interpreted). Instead, the defense in this case seeks to superimpose on the text of the no-fault law what it claims must be said by the care provider and what must be submitted by the insured. If adopted by this Court, the position espoused by the defense in the case at bar will force family members to step away from providing care to injured loved ones in the home because of the imposition of such hyper-technical requirements on no-fault reimbursement. The end result will be that the injured person must turn to commercial agencies for care or the family members must join or become a commercial agency to be compensated

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under the no-fault law, which can only serve to drive up the cost of the no-fault system. CPAN opposes such an interpretation because it will drive up costs and hurt the system.

Obviously, this Court does not need to tackle the issue of what "incurred" means in all contexts and under every circumstance: the question in this case is limited to when expenses are incurred in the context of in-home family member provided care. CPAN has filed this amicus brief solely to make the point that if care is rendered by a family member to an injured person, expenses have been incurred by the insurer pursuant to its no-fault insurance contract, and those expenses are compensable (so long as the requirements of reasonableness, necessity, and relationship to the injuries sustained in the auto accident are established – and the no-fault insurer cannot simply argue that an expense was not incurred because the care provider did not expect to be paid by his or her family member.

WHEREFORE, the Coalition Protecting Auto No-Fault (CPAN), as amicus curiae, request that this Court reject the arguments being made by the defense in this case, which would go far beyond the text of the No-Fault Act by creating new requirements for plaintiffs to be compensated under the no-fault system for in-home family member provided care.

Respectfully submitted,

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